SAMBU (M) SDN. BHD.

v.

STONE WORLD SDN. BHD. (FORMERLY KNOWN AS KOSTONE SDN. BHD.) & ANOR.

HIGH COURT MALAYA, JOHORE BAHRU
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK J
[CIVIL SUIT NO: 22-284-1995]
10 MARCH 1996

CIVIL PROCEDURE: *Judgment - Consent to an order - Whether could be arbitrarily withdrawn - Ensuing order - Whether effectively a consent judgment - Effect - Whether proceedings to come to an end - Whether parties precluded from taking further steps in action - Appeal against order - Whether proper - Conduct of Counsel in Court - Governing rules - Legal Profession (Practice and Etiquette) Rules 1978 rr. 17, 18.*

On 31 January 1996, before the Senior Assistant Registrar (Registrar), the plaintiff obtained summary judgment against the first defendant for a sum of RM1,915,819. Thereupon the first defendant filed a notice of appeal to the Judge in Chambers under O.56 Rules of the High Court 1980, and on 15 February 1996 the matter came before the learned Judge. At the hearing that followed, Counsel for both parties intimated to the learned Judge that they were agreeable to the learned Judge affirming the summary decision of the Registrar. They however informed the Judge that a further order ought to be made i.e. that the sum of RM1,225,008.10 be referred to arbitration. In view of the consensus, a judgment in terms of the parties' mutual agreement was recorded by the Judge. The consensus notwithstanding, the first defendant, however, lodged an appeal against the judgment and at the same time sought to stay the proceedings under s. 6 of the Arbitration Act 1952. In the circumstances, the issue that arose was whether the judgment given on 15 February 1996 amounted in effect to a consent order, and if so, bearing in mind the lodgment of the appeal herein, whether consent thereto could be arbitrarily withdrawn by Counsel.

Held:

[1] Where the parties had settled or compromised pending proceedings, the settlement or compromise constitutes a new and independent agreement between them made for good consideration. Such a settlement would put an end to the proceedings, preclude the parties from taking further steps in the action and supersede the original cause of action.

[2] The judgment delivered by the Court on 15 February 1996 reflected the consent of both the first defendant and the plaintiff through their respective Counsel, to agree to the decision of the Registrar and for the sum of RM1,225,008.10 to proceed to arbitration. To construe otherwise would go against the record.

[3] The conduct of an advocate and solicitor before the Court should be characterised by candour, courtesy and fairness. Clearly, a judgment or order made by consent, until set aside in proceedings made for that purpose, is binding, and where Counsel by authority of their clients, consents to an order, the consent cannot be arbitrarily withdrawn to prevent the order passing.

[Order accordingly]

Cases referred to:
K.S. Chua & Co. v. Chui Miang Chew & 5 Other [1995] 3 AMR: 2605 ***(foll)***
Re Hearn, de Bertodano v. Hearn [1913] 108 LT 452 ***(foll)***
Harvey v. Croydon Union Rural Sanitary Authority [1884] 26 Ch. D. 249 CA ***(foll)***
Serrao v. Noel [1855] 15 QBD 549 CA ***(foll)***

Legislation referred to:
Arbitration Act 1952, s. 6
Legal Profession (Practice And Etiquette) Rules 1978, r. 17
Rules of the High Court 1980, O. 56, O. 25 r. 1(4)

For the plaintiff - Jagjit Singh, M/s. Jagjit Singh & Co.
For the first defendant - Rodney Gomez, M/s. Shearn Delamore & Co.

JUDGMENT

Abdul Malik Ishak J:

I am suprised that the first defendant lodged an appeal against my decision which was handed down on 15 February 1996 through their Counsel Mr. Rodney Gomez from Messr. Shearn Delarnore & Co. The brief facts that led to my decision dated 15 February 1996 may be summarised in this fashion.

On January 31, 1996, the Senior Assistant Registrar heard an application in chambers vide enclosure 5 where the plaintiff sought for the following prayers:

1. Bahawa Penghakiman Terus di bawah Aturan 14, Kaedah-Kaedah Mahkamah Tinggi, 1980 dimasukkan bagi pihak plaintif terhadap defendan pertama dalam jumlah RM3,140,197.10 atau secara alternatif jumlah RM1,915,189.00 bersama dengan faedah pada kadar 8% setahun dari tarikh penghakiman sehingga tarikh penyelesaian.

2. Bahawa kos permohonan ini di bayar oleh defendan pertama kepada plaintif.

In the event, the Senior Assistant Registrar gave summary judgment in the sum of RM1,915,189.00 against the first defendant who, in due course, filed a notice of appeal to the Judge in Chambers under O. 56 of the Rules of the High Court, 1980 ("RHC"). This was a perfectly legitimate course of action taken by the first defendant. When the matter finally came up before me on 15 February 1996, Mr. Rodney Gomez represented the first defendant while Mr. Jagjit Singh from Messrs Jagjit Singh & Co. appeared for the plaintiff.

What transpired before me on 15 February 1996 was equally amazing. Though both parties made short submissions yet they both agree that the decision of the Senior Assistant Registrar should be affirmed and that, additionally, I was to make an order that the sum of RM1,225,008.10 be referred to arbitration. I did just that.

It must be emphasised that this judgment does not concern the second defendant.

Incidentally it is instructive to note that in enclosure 10, the first defendant sought for the present proceedings to be stayed under s. 6 of the Arbitration Act, 1952 supported by an affidavit of Yap Kiang Sang affirmed on 15 December 1995 where at paragraph 4 thereof he deposed that:

> Saya dengan sesungguhnya percaya menurut fasal 34 kontrak adanya suatu perjanjian untuk merujuk segala pertikaian dan perbezaan kepada timbangtara. Sekarang dikemukakan dan ditunjuk kepada saya dan ditanda sebagai "YKS-1" adalah sesalinan Artikel Perjanjian dan syarat kontrak.

Clause 34 of the contract stipulates that all disputes and differences "... shall be and is hereby referred to the arbitration ..." and clearly this must be the intention of the first defendant when they filed enclosure 10.

Was there deception exerted on this Court tantamount to frustrating the administration of justice when it gave those orders on 15 February 1996?

Rule 17 of the Legal Profession (Practice And Etiquette) Rules 1978 states that: "An advocate and solicitor shall not practice any deception on the Court."

This is followed by r. 18 which states in strong terms that:

> The conduct of an advocate and solicitor before the Court and in relation to other advocates and solicitors shall be characterised by candour, courtesy and fairness.

I did say in *K.S. Chua & Co. v. Chui Miang Chew & 5 Others* [1995] 3 AMR: 2605 especially at page 2618 that:

> Lawyering is not an easy job. It requires hardwork, skill, patience, knowledge of the law and, above all, good health and some measure of luck.

That was said in the context of an O. 25, r. 1 (4) of the RHC where the defendants there sought to dismiss the plaintiffs' claim for want of prosecution. To that I must add that there must also be some measure of intearity and righteousness. Sargant J. in *Re Hearn, de Bertodano v. Hearn* [1913] 108 LT 452 at 454 did say that where the parties settle or compromise pending proceedings, whether before, at or during the trial, the settlement or compromise constitutes a new and independent agreement between them made for good consideration. Its effects have been said to be:

(a) to put an end to the proceedings, for they are thereby spent and exhausted: per Sargant J. in *Re Hearn, de Bertodano v. Hearn (supra);*

(b) to preclude the parties from taking any further steps in the action *(Green v. Rozen* [1955] 2 ALL ER 797; [1955] 1 WLR 741), except where they have provided for liberty to apply to enforce the agreed terms *(Dashwood v. Dashwood* [1927] WN 276);

(c) to supersede the original cause of action altogether *(Smythe v. Smythe* [1887] 18 QBD 544 DC).

It is instructive to mention that in *Harvey v. Croydon Union Rural Sanitary Authority* [1884] 26 Ch. D. 249 CA it was held that where Counsel, by authority of their clients, consent to an order, the consent cannot be arbitrarily withdrawn to prevent the order passing. In *Serrao v. Noel* [1855] 15 QBD 549 CA it was held that a judgment or order made by consent is binding unless and until it has been set aside in proceedings instituted for that purpose and it could be construed as an estoppel by record. It is my judgment that the decision delivered on 15 February 1996 reflected the consent of the first defendant through Mr. Rodney Gomez and the consent of the plaintiff through Mr. Jagjit Singh to agree to the decision of the Senior Assistant Registrar and for the sum of RM1,225,008.10 to proceed to arbitration. To construe otherwise would go against what had been recorded in the notes of proceedings. It is a sad day for the judiciary to see lawyers coming to Court to deceive and frustrate the administration of justice. Will this sad state of affairs continue ad infinitum? Only time will tell.

Reported by W.A. Sharif